In The

# Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,
*Appellant,*

v.

PEOPLE OF THE STATE OF NEW YORK,
*Appellee.*

On Appeal from the
New York Court of Appeals

## REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellee in the above-entitled appeal has moved to dismiss or affirm the judgment of the New York Court of Appeals. This reply brief is submitted in opposition to this motion.

## THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION AND PLENARY REVIEW SHOULD BE GRANTED

### A. In shifting the burden of persuasion to the defendant the New York affirmative defense in question is in direct conflict with *Mullaney* and is in conflict with seven other states which have adopted the Model Penal Code defense of extreme emotional disturbance.

Appellee argues that the New York affirmative defense of "extreme emotional disturbance" constitutes a progressive development in the criminal law (Point A(6) of Appellee's Motion).

While the substance of the defense which constitutes a liberalization of the heat of passion defense may be progressive, this does not justify New York in shifting the burden of persuasion to the defendant in violation of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

Moreover, at least seven other jurisdictions have adopted the Model Penal Code defense of "extreme emotional disturbance" and they have chosen not to shift the burden to the defendant. Hawaii Penal Code Secs. 702, 115 (1974); Kentucky Rev. Stat. Secs. 507.020, 507,030, 500.070 (1975); Rev. Codes of Montana Secs. 94-5-101, 94-5-102, 94-5-103 (1975); N. Dakota Century Code Secs. 12.1-16-02(2), 12.1-01-03(3) (1975); Page's Ohio Rev. Code Secs. 2903.02, 2903.03 (1975); Oregon Rev. Stat. Secs. 163.115(1)(a), 163.055(2) (1975); Utah Code Ann. Secs. 76-5-203, 76-5-205, 76-1-501 (1975).

The Model Penal Code itself does not provide for shifting the burden of persuasion, nor did the original proposed version of the defense in New York contain such a provision. *People v. Patterson*, 39 N.Y.2d 288, 301. This Court should grant plenary review to insure compliance with *Mullaney* and to



insure uniformity among the states in placing the burden of persuasion on the issue of "extreme emotional disturbance" in murder trials.*

### B. A decision on this appeal by this court will resolve doubts in other jurisdictions about the applicability of *Winship* and *Mullaney* to affirmative defenses generally.

Subsequent to the *Mullaney* decision, several state courts, including the court below, have expressed uncertainty about the applicability of *Mullaney* to affirmative defenses generally. See *Commonwealth v. Moyer*, 353 A.2d 447, 449, Pa. (1976) and the reference therein to *Commonwealth v. Rose*, 321 A.2d 880, Pa. (1974); *People v. Tewksbury*, 544 P.2d 1335, 1343, Supr. Calif. (1976); see also *People v. Patterson, supra.*, (Breitel, C.J. concurring opinion).

In the federal courts, the affirmative defense to felony-murder in New York (unrelated to the defense of "extreme emotional disturbance") has been upheld against an "indirect challenge" to its constitutionality. *Robinson v. Warden*, not officially reported, (E.D.N.Y. March 10, 1976, Mishler, J.); aff'd F.2d (2d Cir. June 10, 1976).** The *Robinson* decision (decided prior to *Patterson*) further heightens the need for a

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*In fact, there is not even uniformity in New York on this issue as ". . . it is the policy of the District Attorney for New York County to treat this as an ordinary defense and he has requested the court to place the burden on the People to disprove it beyond a reasonable doubt." *People v. Shelton*, Supreme Court, New York County, N.Y.L.J. 7.1.76, p. 9 col. 3.

** This affirmance was based on the district court opinion below and the Court of Appeals perception that defendant's failure to make proper objection at trial was a calculated maneuver.

definitive statement by this Court concerning affirmative defenses.*

In addition, *Evans v. State*, 349 A.2d 300, (1975) invalidating the Maryland rule shifting to the defendant the burden of proving provocation has been unanimously affirmed by the Court of Appeals of Maryland, A.2d (July 15, 1976 No. 173).

In sum, the court below and other courts are having difficulty in applying *Mullaney* and plenary review should be granted to resolve these difficulties.

**C. Appellant does not challenge New York's interpretation of its murder statute.**

Appellee argues that this appeal should be dismissed since the sole basis of the New York Court of Appeals decision is one of statutory construction (Point A(1) of Appellee's Motion). Appellant agrees that the New York Court of Appeals construction of the New York murder statute is binding on this Court. However, appellant argues that there exists constitutional error in not applying *Mullaney v. Wilbur*, to strike down the New York affirmative defense of "extreme emotional disturbance" as construed by the New York Court of Appeals.

*Appellee's reliance on *United States ex rel Castro v. Regan*, 525 F.2d 1157 (3rd Cir. 1975) is misplaced since it is clear that under New Jersey law there is no shifting of any burden of persuasion to the defendant in a murder prosecution. See *State v. Robinson*, 354 A.2d 374, 380, 139 N.J. Super. 475 (1976).



**D. The insanity defense is not in issue on this appeal.**

Appellee also cites cases upholding the requirement that the defendant bear the burden of proving insanity in support of the proposition that *Patterson* is consistent with other jurisdictions in applying *Mullaney* (Point A(5) of Appellee's Motion). Appellant in his Jurisdictional Statement has previously shown that the insanity defense is clearly a distinct defense in New York, and, most importantly, the People in New York have the burden of persuasion. New York Penal Law, §§25.00, 30.05, Compare *Fuentes v. State*, 349 A.2d 1 Del. (1975) (invalidating the affirmative defense of "extreme emotional distress") with *Rivera v. State*, 351 A.2d 561 Del. (1976) (upholding the affirmative defense of mental illness).* This Court has recognized such a distinction. *Leland v. Oregon*, 343 U.S. 790 (1952); *Mullaney v. Wilbur, supra.*, Rehnquist (conc.). But see *Buzynski v. Oliver*, 45 U.S.L.W. 2062 C.A. 1, July 14, 1976.

In sum, the burden of proving insanity is not an issue in this case.

*The attempt to link the insanity defense with the modern version of the heat of passion defense has grave pitfalls. Consider the inquiry of Justice Kassal in *People v. Shelton, supra.*, at page 9 col 1:

> "In order to arrive at a definition of 'extreme emotional disturbance' to apply to defendant's actions in this case, I asked both forensic psychiatrists to state their understanding of the term. (Both are very experienced witnesses who have given expert testimony in hundreds of cases.)
>
> "They agreed that this term is a creature of law and has no diagnostic classification in the Diagnostic and Statistical Manual of the American Psychiatric Association."

## CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Ithaca, New York
August, 1976

Respectfully submitted,

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Victor J. Rubino

*Attorneys for Appellant.*